

1 WILLIAM E. KOVACIC  
General Counsel

2  
3 ROBERT SUSSMAN  
WALTER GROSS III  
4 AMY LLOYD  
Attorneys for the Plaintiff  
5 Federal Trade Commission  
600 Pennsylvania Avenue N.W.  
6 Washington, D.C. 20580  
(202) 326-2747 - RS  
7 (202) 326-3319 - WG  
(202) 326- 2559 - fax

8 JOHN D. JACOBS  
9 Cal. Bar. No.134154  
10877 Wilshire Boulevard  
10 Suite 700  
Los Angeles, California 90024  
11 (310) 824-4360  
(310) 824-4380 - fax

12  
13 IN THE UNITED STATES DISTRICT COURT  
14 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

15 \_\_\_\_\_ )  
16 FEDERAL TRADE COMMISSION, )

17 Plaintiff, )

18 v. )

19 ELECTRONIC PRODUCTS DISTRIBUTION, )

20 L.L.C., )

21 ENERGIZER PRODUCTS, INC., )

22 ABFLEX USA, INC., )

23 AB ENERGIZER, L.L.C., )

24 THOMAS C. NELSON, )

25 HOLLY HERNANDEZ, a/k/a HOLLY )

26 BRYAN, )

27 and )

28 MARTIN VAN DER HOEVEN, )

Defendants. )  
\_\_\_\_\_ )

CIVIL ACTION NO.

COMPLAINT FOR PERMANENT  
INJUNCTION AND OTHER  
EQUITABLE RELIEF

1 Plaintiff, the Federal Trade Commission (“FTC”), through its undersigned attorneys, alleges  
2 as follows:

3 1. Plaintiff FTC brings this action under Section 13(b) of the Federal Trade Commission  
4 Act ("FTC Act"), 15 U.S.C. § 53(b), to secure a permanent injunction, consumer redress,  
5 disgorgement, and other equitable relief against the Defendants for engaging in deceptive acts or  
6 practices in connection with the advertising, marketing, and sale of the AB Energizer electronic  
7 exercise belt (“AB Energizer”), which purports to cause loss of weight, fat, and inches, and highly  
8 developed abdominal muscles, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C.  
9 §§ 45(a) and 52.

10  
11 **JURISDICTION AND VENUE**

12 2. This Court has subject matter jurisdiction over this matter pursuant to 15 U.S.C.  
13 §§ 45(a), 52, and 53(b), and 28 U.S.C. §§ 1331, 1337(a), and 1345.

14 3. Venue in this district is proper under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b) and  
15 (c).

16  
17 **THE PARTIES**

18 4. Plaintiff, the Federal Trade Commission, is an independent agency of the United States  
19 Government created by statute. See 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the  
20 FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting  
21 commerce. The FTC also enforces Section 12 of the FTC Act, 15 U.S.C. § 52, which prohibits  
22 false advertisements for food, drugs, devices, services, or cosmetics in or affecting commerce. The  
23 FTC may initiate federal district court proceedings to enjoin violations of the FTC Act and to  
24 secure such equitable relief, including consumer redress, as may be appropriate in each case. 15  
25 U.S.C. § 53(b).

26 5. Defendant Electronic Products Distribution, L.L.C. (“EPD”) is a California limited  
27 liability company located at 7975 Raytheon Road, Suite 380, San Diego, California. At all times  
28 relevant to this Complaint, acting alone or in concert with others, EPD has manufactured,

1 marketed, and sold devices it has promoted as exercise equipment, including the AB Energizer.  
2 EPD transacts or has transacted business in the Southern District of California.

3 6. Defendant Energizer Products, Inc. (“Energizer”) is a California corporation located at  
4 18375 Ventura Boulevard, Suite 403, Tarzana, California. At all times relevant to this Complaint,  
5 acting alone or in concert with others, Energizer has marketed and sold the AB Energizer.  
6 Energizer transacts or has transacted business in the Southern District of California.

7 7. Defendant Abflex USA, Inc. (“Abflex”) is a California corporation located at 7975  
8 Raytheon Road, Suite 380, San Diego, California, and 445 Marine Avenue, Del Mar, California.  
9 Abflex owns the Ab Energizer trademark and registered the website for AB Energizer,  
10 [www.abenergizer.com](http://www.abenergizer.com). At all times relevant to this Complaint, acting alone or in concert with  
11 others, Abflex has marketed and sold the AB Energizer. Abflex transacts or has transacted  
12 business in the Southern District of California.

13 8. Defendant AB Energizer, L.L.C. (“AE”) is a California limited liability company located  
14 at 7975 Raytheon Road, Suite 380, San Diego, California. At all times relevant to this Complaint,  
15 acting alone or in concert with others, AE has marketed and sold the AB Energizer. AE transacts  
16 or has transacted business in the Southern District of California.

17 9. Defendant Thomas C. Nelson (“Nelson”) is a general partner of EPD and the Chief  
18 Financial Officer of Energizer. At all times relevant to this Complaint, acting alone or in concert  
19 with others, Nelson has formulated, directed, controlled or participated in the acts and practices of  
20 EPD, including the various acts and practices set forth herein. He transacts or has transacted  
21 business in the Southern District of California.

22 10. Defendant Holly Hernandez, a/k/a Holly Bryan (“Hernandez”) is a general partner and  
23 registered agent of EPD. She is also the registered agent for AE. At all times relevant to this  
24 Complaint, acting alone or in concert with others, Hernandez has formulated, directed, controlled  
25 or participated in the acts and practices of EPD, including the various acts and practices set forth  
26 herein. She transacts or has transacted business in the Southern District of California.

27 11. Defendant Martin Van Der Hoeven (“Van Der Hoeven”) is the president of Abflex and  
28 acts as a “consultant” to AE. At all times relevant to this Complaint, acting alone or in concert

1 with others, Van Der Hoeven has formulated, directed, controlled or participated in the acts and  
2 practices of Abflex and AE, including the various acts and practices set forth herein. He transacts  
3 or has transacted business in the Southern District of California.

4 12. The foregoing Defendants have operated as a common enterprise to advertise, promote,  
5 offer for sale, sell or distribute the AB Energizer.

6  
7 **COMMERCE**

8 13. The acts and practices of the Defendants, as alleged herein, have been in or affecting  
9 commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

10  
11 **DEFENDANTS’ COURSE OF CONDUCT**

12 14. Since at least the fall of 2001, and continuing thereafter, Defendants EPD, Energizer,  
13 Abflex, AE, Nelson, Hernandez and Van Der Hoeven (collectively, the “Defendants”) have  
14 advertised and sold the AB Energizer nationwide through, but not necessarily limited to, program-  
15 length television infomercials, short television commercials, an Internet website,  
16 [www.abenergizer.com](http://www.abenergizer.com), and product packaging. Transcripts or facsimiles of these materials are  
17 annexed hereto as Exhibits 1 through 6.

18 15. The Defendants have offered the AB Energizer for \$59.95, plus shipping and handling,  
19 directly to consumers through a toll-free telephone number and the Defendants’ Internet website.  
20 Additionally, the AB Energizer has been available in retail outlets such as Modell’s Sporting  
21 Goods, Target, and The Sports Authority. Along with the AB Energizer, consumers have received  
22 a user’s manual (which includes a weight loss guide), an instructional video, a water-based gel, and  
23 a carrying bag. As a bonus, consumers have received a thirty-day supply of “Diet Energizer,” a  
24 dietary supplement containing botanical equivalents to ephedrine, caffeine, and aspirin - ingredients  
25 commonly promoted as weight loss agents.

26 16. The AB Energizer is an electronic muscle stimulation device. To use the AB Energizer,  
27 consumers attach two or four small electrodes (battery-operated powered units) to a belt, apply the  
28 water-based gel to both the section of the belt that holds the electrodes and to the targeted muscles,

1 put the belt on, and push a button. According to the Defendants, the AB Energizer delivers gentle  
2 electronic impulses to targeted muscles. The targeted muscles purportedly react to the impulses by  
3 contracting and relaxing involuntarily, in a manner that the Defendants claim is similar to the  
4 contractions associated with abdominal exercises such as sit-ups and crunches.

#### 6 **Defendants' advertisements and claims for the AB Energizer**

7 17. The Defendants have disseminated or caused to be disseminated a 30-minute  
8 infomercial that has appeared more than 1650 times between October 2001 and February 22, 2002  
9 on about 35 national cable stations. The AB Energizer infomercial has often been among the ten  
10 most frequently aired infomercials, and the Defendants spent more than eight million dollars  
11 (\$8,000,000) to broadcast the AB Energizer infomercial between October 2001 and January 2002  
12 alone.

13 18. The infomercial features two hosts. The first, John McCafferty, pretends to be  
14 unfamiliar with the AB Energizer and skeptical of its effectiveness. The second, Kita Pelly, is  
15 presented as a "nationally recognized fitness expert" who, through the course of the infomercial,  
16 attempts to prove to John McCafferty that the AB Energizer can safely provide "rock-hard abs."  
17 By the end of the infomercial, skeptic co-host John McCafferty is convinced that the AB Energizer  
18 is a safe and effective substitute for abdominal exercise and that it causes "rock-hard abs" and  
19 weight loss. The infomercial also includes: (1) user testimonials, (2) scientific-looking images that  
20 purport to illustrate how the AB Energizer functions, (3) commentary by Dr. Michael Skyhar, an  
21 orthopedic surgeon, and (4) male and female models with exceptional abdominal definition dressed  
22 in bikinis and tight-fitting workout clothes. Ex. 1, AB Energizer infomercial videotape; Ex. 2, AB  
23 Energizer infomercial transcript.

24 19. The Defendants also have disseminated or caused to be disseminated a one-minute  
25 television commercial ("short spot") that encapsulates the primary messages of the 30-minute  
26 infomercial. The short spot includes over ten images of models with exceptional abdominal  
27 definition dressed in bikinis and workout clothes. Ex. 3, short spot videotape; Ex. 4, short spot  
28 transcript.

1           20. The advertisements and promotional materials for the AB Energizer discussed in  
2 Paragraphs 14 and 17 to 19 (“AB Energizer Promotional Materials”) convey four core messages  
3 about the efficacy, performance, and safety of the AB Energizer: (1) the AB Energizer causes loss  
4 of weight, inches, and fat; (2) causes well-defined abdominal muscles (e.g., “go from flab to rock-  
5 hard abs,” “get the tight abs you’ve been dreaming about,” and develop the “six-pack abs you’ve  
6 been dreaming about.”); (3) use of the AB Energizer is equivalent to abdominal exercises such as  
7 sit-ups and crunches; and (4) the AB Energizer is safe for all users.

8  
9 (1) Loss of weight, inches and fat claims

10           21. The AB Energizer Promotional Materials have included, but are not necessarily limited  
11 to, the following statements and depictions about how the AB Energizer causes loss of weight,  
12 inches, and fat:

13           a. KITA PELLY: “The AB Energizer System is absolutely incredible for people  
14 who want tighter abs and want to lose inches around the midsection.” Ex. 2 at 29-30.

15           b. KITA PELLY: “[I]t works not only your abs, but it also tightens and firms your  
16 love handles, your lower back, your thighs and your buns, too... The AB Energizer gives  
17 you firm, toned abs without even breaking a sweat.” Ex. 2 at 38.

18           c. JOHN McCAFFERTY: “So, I work my stomach muscles without breaking a  
19 sweat and get rid of that gut once and for all?”

20           KITA PELLY: “It’s worked for thousands of men and women and I don’t see any  
21 reason why it won’t work for you.” Ex. 2 at 56-57.

22           d. UNIDENTIFIED MALE USER: “I’ve lost 40 pounds. I’ve gone from a waist  
23 37 to a waist 34. The AB Energizer and the AB Energizer System has [sic] changed my life  
24 and it’s really given my life back to me.” Ex. 2 at 31. See also id. at 40, 51, 60; Ex. 4 at 74.

25           ON SCREEN IMAGE/TEXT: Shortly before this statement, the viewer is shown a  
26 “before” picture of the visibly overweight user, with the words “**Before 225 lbs.**” in large,  
27 bold letters to his left. During the statement, the screen is split into two images, adding a  
28 leaner “after” photograph to contrast with the bulky “before” photograph. The words:

1           “**Lost 40 lbs., size 37 to 34**” appear in large yellow and white letters between the before and  
2 after photographs.

3           At the same time, at the bottom of the screen in small print approximately one tenth  
4 the size of the weight loss claim, in poorly contrasting lettering, appear the words: “Results  
5 not typical. Individual results may vary.”

6           e. UNIDENTIFIED FEMALE USER: “My body already feels tighter. I’ve lost  
7 three pounds.” Ex.2 at 33.

8           f. UNIDENTIFIED FEMALE USER: “I’ve lost just under 10 pounds in 2 and a  
9 half weeks.” Ex. 2 at 33.

10           ON SCREEN IMAGE/TEXT: The viewer is shown a “before” photograph of the  
11 user, and the words “**Lost 10 Lbs.**” flash across the top of the screen in large, bold yellow  
12 letters. The screen then splits into “before” and “after” images, in which the user appears  
13 much thinner in the “after” picture. [Same message and display characteristics described in  
14 Paragraph 22(d) appear at Ex. 2 at 33.]

15           g. UNIDENTIFIED MALE USER: “I’ve lost 12 pounds and 3 inches off my waist  
16 in 4 weeks.” Ex. 2 at 33.

17           ON SCREEN IMAGE/TEXT: The words “**Lost 12 lbs. 3" off waist!**” appear on  
18 the screen. [Same message and display characteristics described in Paragraph 22(d) appear  
19 at Ex. 2 at 33.]

20           22. Information contained only in the AB Energizer user’s manual and website has  
21 divulged that the AB Energizer does not burn calories. Exhibit 5(b), AB Energizer website, at 95;  
22 Exhibit 7, AB Energizer user’s manual, at 114. The user’s manual, which consumers receive after  
23 they buy the product, has added that the AB Energizer is purportedly a two-part “system,” and that  
24 under this “system,” the AB Energizer itself supposedly contributes to muscle formation, whereas  
25 “[t]he rest of the System (the AB Energizer Dietary Supplement and this Weight Loss Guide) will  
26 help you achieve your weight loss goals!” Ex. 7 at 113. The user’s manual has also stated that the  
27 AB Energizer “does not claim to burn fat away” and “does not substitute for cardio-vascular  
28 exercise.” Ex. 7 at 114, 133.

1 (2) Well-defined abdominal muscles claims

2 23. The AB Energizer Promotional Materials have included, but are not necessarily limited  
3 to, the following statements and depictions about how the AB Energizer causes well-defined  
4 abdominal muscles (e.g., “go from flab to rock-hard abs,” “get the tight abs you’ve been dreaming  
5 about,” and develop the “six-pack abs you’ve been dreaming about.”):

6 a. VOICE-OVER (four times): “With a touch of a button, you can go from flab to  
7 rock-hard abs.” Ex. 2 at 22, 39, 50, 62.

8 ON SCREEN IMAGE: A flabby, overweight male torso transforms (“morphs”) into  
9 a slender male torso with “six-pack” abdominal muscles. Both subjects are wearing the  
10 same bathing trunks, but their faces are never shown.

11 b. VOICE-OVER (four times): “Introducing the revolutionary AB Energizer  
12 System, featuring 21<sup>st</sup> century scientific technology that gives you a simple, effective, easy  
13 way to get firm, toned abs without breaking a sweat.” Ex. 2 at 23, 39, 50-51, 62.

14 ON SCREEN IMAGE/TEXT: One male and one female torso, both with well-  
15 defined muscles, wearing the AB Energizer, followed by an array of sculpted torsos in  
16 bathing suits. At the same time, the words “**Simple & Easy,**” “**Firm Tone Abs,**” and “**No**  
17 **Sweat**” flash onto the screen.

18 c. VOICE-OVER: “Now you can get the tight abs you’ve been dreaming about  
19 without breaking a sweat with the AB Energizer.” Ex. 2 at 25.

20 d. KITA PELLY: “Poor muscle tone allows your waistline to drift down and droop  
21 into the pelvic girdle. The end result is your stomach droops even though you’re not really  
22 that heavy. The answer is easy. The AB Energizer’s electronic impulses stimulate your abs  
23 so they contract and relax as if you’re doing a sit-up. So, it firms and tones your lower  
24 abdominals.” Ex. 2 at 56.

25 ON SCREEN IMAGE: A scientific-looking green-lined graphic on a black  
26 background depicts the profile of a human torso. The “drooping stomach” area is depicted  
27 as a plump yellow slab placed within the green lines of the torso, and there are two AB  
28

1 Energizer electrodes placed near the yellow slab. As Ms. Pelly speaks, the torso contracts,  
2 and the yellow slab quickly shrinks.

3 e. KITA PELLY: “So, why not get the six-pack abs you’ve been dreaming about?  
4 You can do it sooner than you think with the AB Energizer.” Ex. 2 at 67.

5 f. The box cover has included three photographs of people wearing the AB  
6 Energizer on various body parts, with the phrases “Tighter Abs,” “Firmer Buttocks,” and  
7 “Sculpted Thighs.” The subjects in all three photographs have well-defined muscles.  
8 Exhibit 6, AB Energizer package cover, at 106, 107.

9 24. Throughout the infomercial and short spot, when speakers discuss the AB Energizer,  
10 there have been images of men and women with sculpted, well-defined and developed abdominal  
11 muscles. Exs. 1 and 3.

12  
13 (3) Equivalent to abdominal exercise claims

14 25. The AB Energizer Promotional Materials have included, but are not necessarily limited  
15 to, the following statements and depictions about how use of the AB Energizer is equivalent to  
16 abdominal exercises such as sit-ups and crunches:

17 a. VOICE-OVER: “[S]timulate your abs so they contract and relax as if you’re  
18 doing a sit-up. Now you can get 700 muscle exercising contractions in just 10 minutes and  
19 get abs with the tone and definition you’ve always dreamed of.” Ex. 2 at 23-24, 39-40, 51,  
20 62-63, Ex. 4 at 73.

21 ON SCREEN TEXT: “**Stimulate abs,**” “**up to 700 muscle contractions,**” and “**10**  
22 **minutes.**”

23 b. KITA PELLY: “Many people think that sit-ups and crunches are the only  
24 answer. Well, I recommend the Ab Energizer.” Ex. 2 at 25.

25 c. KITA PELLY: “It’s safe, fast, and really gets the results you’re after. So, if you  
26 don’t want all that pain and hardship while working out in a sweaty gym on those machines,  
27 or you can’t afford a gym membership, or you just plain don’t want to stand in those long  
28 lines, get the AB Energizer and you’ll be on your way to fitter, tighter abs.” Ex. 2 at 48.

1 d. KITA PELLY: “So, if you’ve been looking for a great way to get firm, toned  
2 abs, waist, hips and thighs, now’s your chance, because the AB Energizer does the thinking  
3 and workout for you. You don’t have to sweat, you don’t have to do sit-ups or use any  
4 more ab machines on the floor. It’s as easy as putting on a belt and pushing a button.” Ex.  
5 2 at 49-50.

6 e. KITA PELLY: “Well, that’s the beauty of 21<sup>st</sup> century scientific technology  
7 perfected. The AB Energizer’s programmable electronic impulses stimulate your abs so  
8 they contract and then relax, just as if you’re doing a sit-up or working out on an ab  
9 machine. So, your muscles are programmed to think that they’re exercising the old-  
10 fashioned way on the floor and sweating.” Ex. 2 at 59-60.

11  
12 (4) Safety claims

13 26. The pre-sale AB Energizer Promotional Materials have included, but are not  
14 necessarily limited to, the following statements and depictions that the AB Energizer is safe for all  
15 users:

16 a. DR. MICHAEL SKYHAR: “[T]he AB Energizer with its electrical muscle  
17 stimulation, provides a safe way to strengthen any muscle and increase that muscle’s mass.”  
18 Ex. 2 at 29.

19 b. KITA PELLY: “[J]ust about anybody can use the AB Energizer.” Ex. 2 at 36.

20 ON SCREEN TEXT: In small, white, poorly contrasting letters at the bottom:  
21 “Consult your doctor or medical professional before starting any exercise program.”

22 c. The AB Energizer website has included a photograph of Dr. Skyhar, under the  
23 banner “What Experts Say,” along with his statement recommending the AB Energizer  
24 because it is “safe, comfortable, simple and effective.” Ex. 5(a) at 78.

25 d. The Frequently Asked Questions section of the website has asked if the AB  
26 Energizer is safe and answered: “The AB Energizer is a safe, effective way to stimulate,  
27 tighten, and tone muscles.” Exs. 5(b) at 94. It has also stated that EMS devices have been  
28

1 used by doctors and permitted by the Olympic Medal Advisory Committee for many years.

2 Id.

3 e. The Dr. Skyhar photograph and statement in Paragraph 26(c) has also appeared  
4 on the package cover. Ex. 6 at 108.

5 27. Although the AB Energizer promotional materials state that the device is safe, the AB  
6 Energizer user's manual has warned that the AB Energizer should not be used by people with  
7 cancer, or by anyone who has a cardiac pacemaker. In addition, they warn that users should seek  
8 advice from their doctor before using the machine if they have, inter alia:

- 9 • Phlebitis in its active phase (inflammation of a vein);
- 10 • Tissue inflammation from disease or injury (e.g. nervous tissue disorder);
- 11 • Varicose veins in its later stages;
- Cancerous lesions.

12 Ex. 7 at 130. This information has not appeared in any of the television advertisements, and was  
13 included on the website only in about April 2002.

#### 14

15 **Refund and delivery practices**

16 28. The Defendants have offered a refund to consumers who do not lose at least two inches  
17 off their waists in the first 30 days. The AB Energizer Promotional Materials have included, but  
18 are not limited to, the following statement: "The AB Energizer system is guaranteed. If you don't  
19 lose at least two inches off your waist in the first 30 days, return it for a full refund of the purchase  
20 price, no questions asked." Ex. 2 at 44, 55, 67; Ex. 4 at 75. The Defendants have provided a  
21 customer service telephone number on the consumers' credit card bill for consumers who wish to  
22 return the product and receive a refund. A recorded phone message on the customer service  
23 telephone number has provided an email address as another method for consumers who wish to  
24 return the product and request a refund.

25 29. Numerous consumers who sought refunds were unable to reach an operator at the  
26 Defendants' customer service phone number, even after waiting on hold for long periods.  
27 Similarly, in numerous instances, consumers who sent emails either received no response or  
28 received an "auto-response" that did not facilitate product returns or refunds.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13

**COUNT TWO  
WELL-DEFINED ABDOMINAL MUSCLES CLAIMS**

35. Through the means described in Paragraphs 14, 17 through 20, and 23 through 24, the Defendants have represented, expressly or by implication, that the AB Energizer causes well-defined abdominal muscles (e.g., “go from flab to rock-hard abs,” “get the tight abs you’ve been dreaming about,” and develop the “six-pack abs you’ve been dreaming about.”).

36. In truth and in fact, the AB Energizer does not cause well-defined abdominal muscles (e.g., “go from flab to rock-hard abs,” “get the tight abs you’ve been dreaming about,” and develop the “six-pack abs you’ve been dreaming about.”). Therefore, the making of the representations set forth in Paragraph 35 constitutes a deceptive practice, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

14  
15  
16  
17  
18  
19  
20  
21  
22  
23

**COUNT THREE  
FALSE EQUIVALENT TO EXERCISE CLAIMS**

37. Through the means described in Paragraphs 14, 17 through 20, and 25, the Defendants have represented, expressly or by implication, that use of the AB Energizer is equivalent to performing abdominal exercises such as sit-ups and crunches.

38. In truth and in fact, use of the AB Energizer is not equivalent to performing abdominal exercises such as sit-ups and crunches. Therefore, the making of the representations set forth in Paragraph 37 constitutes a deceptive practice, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

24  
25  
26  
27  
28

**COUNT FOUR  
FAILURE TO DISCLOSE SAFETY RISKS**

39. Through the means described in Paragraphs 14, 17 through 20, and 26, the Defendants have represented, expressly or by implication, that the AB Energizer is safe for all users. In connection with repeated references to safety, the Defendants have failed to disclose or to disclose

1 adequately that the AB Energizer is not safe for all users. In fact, the AB Energizer should not be  
2 used by people with implanted cardiac pacemakers; it poses health risks for use over or near  
3 cancerous lesions, and swollen, infected or inflamed areas or skin eruptions, e.g., phlebitis,  
4 thrombophlebitis, varicose veins; and the AB Energizer's safety has not been established for  
5 pregnant women. These facts would be material to consumers in their purchase of the AB  
6 Energizer.

7 40. In light of the representations made in Paragraph 26, the Defendants' failure to disclose  
8 the material information in Paragraph 39 about health risks was, and is, a deceptive practice, and  
9 constitutes false advertising of a device, in or affecting commerce, in violation of Sections 5(a) and  
10 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

11  
12 **COUNT FIVE**  
13 **FAILURE TO HONOR MONEY BACK GUARANTEE**

14 41. Through the means described in Paragraphs 14, 17 through 20, and 28, the Defendants  
15 have represented, expressly or by implication, that they will provide timely refunds to consumers  
16 who do not lose two inches off their waists within 30 days, no questions asked.

17 42. In truth and in fact, in many instances, the Defendants did not provide timely refunds to  
18 consumers who did not lose two inches off their waists within 30 days, no questions asked.  
19 Therefore, the making of the representations set forth in Paragraph 41 constitutes a deceptive  
20 practice, in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

21  
22 **COUNT SIX**  
23 **VIOLATION OF THE MAIL ORDER RULE**

24 43. The Rule Concerning Mail or Telephone Order Merchandise ("Mail Order Rule") was  
25 promulgated by the FTC on October 22, 1975, under the FTC Act, 15 U.S.C. § 41 et seq. On  
26 September 21, 1993, the Mail Order Rule was amended under Section 18 of the FTC Act, 15  
27 U.S.C. § 57a, and the amendments took effect March 1, 1994. The Mail Order Rule applies to  
28 orders placed by mail, telephone, facsimile transmission or on the Internet.

1 44. At all times material hereto, the Defendants have engaged in the sale of merchandise  
2 ordered by mail, telephone or the Internet, in commerce.

3 45. In numerous instances, after having solicited orders for merchandise and received  
4 “properly completed orders,” as that term is defined in Section 435.2(d) of the Mail Order Rule, 16  
5 C.F.R. § 435.2(d), and having been unable to ship the merchandise to the buyer within the Mail  
6 Order Rule’s applicable time, as set forth in Section 435.1(a)(1) of the Mail Order Rule  
7 (“applicable time”), 16 C.F.R. § 435.1(a)(1), the Defendants:

8 a. Violated Section 435.1(b)(1) of the Mail Order Rule, 16 C.F.R. § 435.1(b)(1), by  
9 failing, within the applicable time, to offer to the buyer, clearly and conspicuously and  
10 without prior demand, an option either to consent to the delay in shipping or to cancel the  
11 order and receive a prompt refund; and

12 b. Having failed within the applicable time to ship the merchandise or to offer the  
13 buyer the option to either consent to a delay or to cancel the buyer’s order and receive a  
14 prompt refund, violated Section 435.1(c)(5) of the Mail Order Rule, 16 C.F.R.

15 § 435.1(c)(5), by failing to deem the order canceled and to make a prompt refund to the  
16 buyer, as “prompt refund” is defined in Section 435.2(f) of the Rule, 16 C.F.R. § 435.2(f).

17 46. Pursuant to Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), violations of the  
18 Mail Order Rule constitute unfair or deceptive acts or practices in or affecting commerce, in  
19 violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

20  
21 **CONSUMER INJURY**

22 47. Consumers throughout the United States have suffered and continue to suffer  
23 substantial monetary loss and may suffer physical injury as a result of the Defendants’ unlawful  
24 acts and practices. In addition, the Defendants also have been unjustly enriched as a result of their  
25 unlawful practices. Absent injunctive relief by this Court, the Defendants are likely to continue to  
26 injure consumers, reap unjust enrichment, and harm the public interest.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: \_\_\_\_\_

Respectfully submitted,

WILLIAM E. KOVACIC  
General Counsel

ELAINE D. KOLISH  
Associate Director for Enforcement

JONI LUPOVITZ  
Assistant Director for Enforcement

---

JOHN D. JACOBS  
Cal. Bar No. 134154  
10877 Wilshire Boulevard  
Suite 700  
Los Angeles, California 90024  
(310) 824-4360  
(310) 824-4380 - fax

ROBERT SUSSMAN  
WALTER GROSS III  
AMY LLOYD  
Attorneys for the Plaintiff  
Division of Enforcement  
Bureau of Consumer Protection  
Federal Trade Commission  
Washington, D.C. 20580  
(202) 326-2747 - RS  
(202) 326-3319 - WG  
(202) 326-2559 (fax)